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No. 546

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1966

EDGAR I. SHOTT, JR.,
Petitioner

vs.

THOMAS A. CONROY, Trustee in Bankruptcy for Leslie D. Stickler, Bankrupt,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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EDGAR I. SHOTT, JR.,

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vs.

THOMAS A. CONROY, Trustee in Bankruptcy for Leslie D. Stickler, Bankrupt,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on July 8, 1966.

OPINION BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit is reported in —— F. (2d) ——.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 8, 1966 and the order of such court denying petition for rehearing was entered on Au-

gust 9, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether Respondent's motion for summary judgment was properly granted in an action to recover payments of money made by the Bankrupt to Petitioner where (i) the court was required to resolve contested issues of material facts as to the fraudulent intent of the Bankrupt and as to Petitioner's knowledge thereof, and where (ii) the court erred in its application of the substantive law of the State of Ohio?

THE STATUTES INVOLVED

In addition to Rule 56, Federal Rules of Civil Procedure, reproduced in the Appendix, the following statutes are pertinent:

"Title 11 U.S.C. Sec. 110e (1) and (3)

Title to Property

e. (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.

* * *

(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State Court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

Ohio Revised Code

Sec. 1313.56 Appointment of receiver. (G.C. Sec. 11104)

> A sale, conveyance, transfer, mortgage, or assignment, made in trust or otherwise by a debtor, and every judgment suffered by him against himself in contemplation of insolvency and with a design to prefer one or more creditors to the exclusion in whole or in part of others, and a sale, conveyance, transfer, mortgage, or assignment made, or judgment procured by him to be rendered, in any manner, with intent to hinder, delay, or defraud creditors, is void as to creditors of such debtor at the suit of any creditor.
>
> * * *

Sec. 1313.57 Knowledge of fraudulent intent material; mortgage in good faith (G.C. Sec. 11105)

> Section 1313.56 of the Revised Code does not apply unless the person to whom such sale, conveyance, transfer, mortgage, or assignment is made, knew of such fraudulent intent on the part of such debtor. . . ."

While Respondent also relied on Ohio Revised Code Section 1335.02, entitled "Gifts and grants to defraud creditors void," the opinion of the Court of Appeals discloses sole reliance on the two Ohio statutes quoted above.

STATEMENT OF THE CASE

The essential facts may be extracted from the opinion below:

> ". . . the district court . . . granted the motion of plaintiff-appellee (Respondent) for summary judgment, overruled the motion of defendant-appellant (Petitioner) for summary judgment, and entered judgment against defendant-appellant (Petitioner) for $1,363,410.00 with interest and costs.

> Plaintiff-appellee (Respondent), Thomas A. Conroy, is the trustee in bankruptcy for Leslie D. Stickler, referred to herein as 'bankrupt.' The bankrupt inaugurated a scheme wherein he would borrow a sum of money from A, then borrow from B to repay A, borrow from C to repay B and so on. The inducement was a high rate of interest on a short term. This is referred to as a 'Ponzi'-type scheme. See *Cunningham, Trustee of Ponzi* v. *Brown*, 265 U.S. 1.
>
> (Petitioner), Edgar I Shott, Jr. . . . was a lender to the bankrupt. Both bankrupt and (Petitioner) were attorneys and had been friends since childhood. Millions of dollars were involved in the scheme and it appears that some 120 or more people made loans to the bankrupt in widely varying amounts, aggregating $3,309,462.05.
>
> The trustee sued the (petitioner) to recover a cumulative total of $1,343,410.00, representing some 600 transactions between the (petitioner) and the bankrupt. The action was filed on March 20, 1963, more than two years after the January 18, 1961 adjudication of bankruptcy.[1] The action is maintained under authority of 11 U.S.C. Sec. 110 (e) (1), (Section 70 (e) (1) of the Federal Bankruptcy Act.)'"[2]

The Court of Appeals, in an opinion marked by the almost total lack of independent intellectual endeavor,

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[1] Petitioner's contention that the two-year statute of limitations of 11 U.S.C. Sec. 29(e) barred all claims except those maintainable under the provisions of 11 U.S.C. Sec. 110e(1) was upheld by the district court.

[2] Because diversity of citizenship is lacking, the action was maintainable in the district court only because of the language of 11 U.S.C. Sec. 110e(3), which provides:

> "F. . the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State Court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

quotes almost the entire written opinion of the District Judge and then concludes:

> "*Upon the basis of the above quoted language* from the opinion of the district court, we conclude that defendant is charged with constructive knowledge of the fraudulent intent of the bankrupt under facts which are not disputed and that the district judge was correct in granting plaintiff's motion for summary judgment on the legal issue of liability." (Emphasis added)

Having affirmed the grant of summary judgment on the liability issue, the judgment of the District Court was vacated and the case ordered remanded solely for a redetermination of the amount of the judgment. On August 19, 1966 an order was entered by the Court of Appeals staying the issuance of mandate in this case for thirty (30) days in order to permit the filing of this petition.

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Although the parties herein had, by joint request, obtained an order that the issues in this case be tried by a jury (App. 7a),[3] the District Judge later suggested the utilization of motions for summary judgment in an attempt to resolve the issue of liability prior to submission of evidence on the issue of damages. While Respondent advanced various legal theories in support of his motion, the District Court grant of the motion was grounded solely on Ohio Revised Code Sec. 1313.56 which provides for voidability of a transfer where there has been an intent to establish preferences among or to defraud credi-

[3] Appellant's Appendix as certificated to this Court as part of the record below. Nine additional copies have been lodged with the Clerk.

tors and on Ohio Revised Code Sec. 1313.57 which limits the application of the preceding section to situations where the transferee "knew of such fraudulent intent on the part of such debtor." It was, therefore, the conclusion of the District Judge that every time the bankrupt made payments to Petitioner, in some "600 or more transactions" spanning a period of five years, the bankrupt had a fraudulent intent to prefer Petitioner or a fraudulent intent to defraud other creditors and that Petitioner knew of such fraudulent intent. Such conclusion was affirmed by the Court of Appeals.

The supporting papers of Respondent consisted of three affidavits — one by Respondent trustee (App. 17a) and two by a Certified Public Accountant (App. 18a) employed by Respondent. Respondent's affidavit described in general and brief terms, the operation of the bankrupt's "get rich quick" scheme. The two affidavits of the accountant contain his opinions and conclusions based upon his "construction" and "reconstruction" of the bankrupt's "books, records and schedules." The first affidavit of the accountant states:

> "The facts disclose further that during the operation of his enterprise Stickler intermingled all of his funds, i.e., those received in the enterprise as well as those *in his law business* and *other personal sources of income* and deposited substantially all of said funds in the same bank account." (Emphasis added). (App. 19a)

Such affidavit also contained the assertion that "Stickler paid Shott in some instances by endorsing checks to Shott received by Stickler from other lenders who were also participating in Stickler's enterprise."

Petitioner's supporting papers consisted of his affidavit (App. 26a) and that of his secretary (App. 28a). Petitioner

denied that he had knowledge or reason to believe that payments made to him on his loans were made with funds borrowed from others; established that his debts were never prepaid by the bankrupt; denied knowledge of, or reason to believe, insolvency of the bankrupt until the matter became public in January 1961, and stated.

> "5. I did not, nor do I now believe, that in paying the promissory notes which represented the loans I had made to Stickler, that Stickler intended to prefer me over any other creditor or intended to hinder, delay or defraud any other creditor." (App. 27a)

Petitioner's secretary's affidavit concluded:

> "6. I was in daily contact with Mr. Shott at the office five or six hours a day for five and one-half days a week for the six-month period preceding January 7, 1961, and I know that Mr. Shott had no knowledge of the actual state of Mr. Stickler's financial affairs. During this entire period Mr. Shott was convinced that Mr. Stickler was a highly successful attorney and a man of integrity. At no time prior to January 7, 1961 did Mr. Shott believe or have reason to believe that Mr. Stickler had any fraudulent intent." (App. 29a)

During the Pre-Trial conference, the District Court sought enlightenment on the question of the bankrupt's intent and asked:

> "Has it ever developed in any of these various proceedings as to what Stickler did have in his mind in this thing? Where did he think he was going with this scheme? Did anybody ever make any sense out of that?" (App. 16b)

Respondent's counsel replied:

> "MR. SPIEGEL: He was asked the question on one of the 21-A exams. We were trying to establish at

that time his insolvency throughout; and he claimed that he thought he had a successful law practice and that he was going to be able to meet all those obligations, that he didn't think it would be able to develop into the crescendo that it did in 1960. I don't know if the man was sick or what the situation was, or what he had in mind, and it's sort of hard to conjecture." (App. 16b)

Respondent stated:

"MR. CONROY: He couldn't really explain what he had in mind near the end, but at the beginning he thought he would work out when it started." (App. 17b)

On the question of the bankrupt's fraudulent intent, counsel for Respondent concluded:

"The question of Mr. Stickler's intent, with all due respect to Mr. Andrews, is an arguable point." (App. 41b)

Respondent did not offer any evidence by the bankrupt, either in affidavit form or by transcript of his testimony given in the bankruptcy proceedings.

THE DISTRICT COURT'S DECISION ON THE MOTION

The District Court held that the "Ponzi"-type operation conducted by the bankrupt, itself being steeped in fraud, is the legal equivalent of an intent by the bankrupt to establish preferences among or to defraud creditors, which is what the Ohio statute condemns. The court said:

"However, since he was insolvent from the moment of the making of the first loan, and since there has

never been a suggestion that any source of income existed except new loans,[4] (if such may be considered a 'source of income'), the question of intent to defraud is not debatable." (App. 33a)

On the question of Petitioner's knowledge of the fraudulent intent to prefer or defraud creditors, the District Court found that there was a "deficiency in the evidence" as to actual knowledge but that such deficiency "does not exist as to constructive knowledge, however, and the record fully supports the conclusion that defendant should have had knowledge of Stickler's fraudulent scheme." (App. 34a). The court's conclusion as to what Petitioner "should have known" was based on "evidence" of "over 600 transactions" from "1956 and extended into 1961" "with exorbitant 'profits' to the lender" to whom "the proper test becomes what a reasonably prudent attorney with a special knowledge of investment matters knew or should have known concerning the financial structure and operation of an individual to whom in hundreds of transactions he advanced sums in excess of $1,000,000." (App. 33a-34a).

The District Court's written opinion contains no reference whatever to Petitioner's supporting affidavits. The opinion of the Court of Appeals would indicate that no examination was made by it of Petitioner's affidavits in that its conclusion "that defendant is charged with constructive knowledge of the fraudulent intent of the bankrupt" was admittedly reached solely on "the basis of the above quoted language from the opinion of the District Court."

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[4] Respondent's supporting papers referred to the bankrupt's income from his "law business and other personal sources of income." (App. 19a).

REASONS FOR ALLOWING THE WRIT

The decision below is in substantial conflict with the applicable decisions of this Court on the role of summary judgment under Rule 56, F.R.C.P. It stands as a unique departure from the well enunciated and well understood decisions thoughout the Federal judiciary in this area. Like the unfortunate illegitimate child brought to the family reunion, it will command no love, nor respect, but, unless reversed, will be used as an "example" for the entire family. It will become an "authority" by which the efficacious use of summary judgment procedure is so seriously impaired that this Court will be besieged by litigants seeking the return to a legally oriented philosophy.

Two core factual questions were before the lower court:

1. Did the bankrupt have an intent to prefer Petitioner over his other creditors or an intent to defraud his other creditors when he repaid Petitioner's loans, at maturity, over a period of five years?
2. If the bankrupt had such a fraudulent intent, did Petitioner know it?

The resolution of these questions requires a determination of the subjective mental processes of two human beings. That summary judgment, is contra-indicated in such area has already been established by this Court.

> "Summary judgments have a place in the anti-trust field, as elsewhere, though, as we warned in *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473, they are not appropriate 'where motive and intent play leading roles.' "
>
> *White Motor Co.* v. *United States,* 372 U.S. 253, 259 (1963)

The District Court ignored the fact that the bankrupt continued to repay all his creditors until he was suddenly forced to suspend operations by the Ohio Division of Securities. It was undoubtedly this fact which prompted the candid admissions of Respondent and his counsel quoted earlier. The bankrupt, himself, had testified in such a manner as to negative a fraudulent intent, but this testimony was not offered by Respondent. It is conceivable that he believed that the proceeds from his "law business and other personal sources of income" would extricate him or, in the alternative, that his operation would continue to expand to the extent that all of his present creditors would be replaced by a new set of creditors. The test, under 11 U.S.C. Sec. 110e (1), is whether he intended to defraud "any creditor of the debtor, having a claim provable under this Act. . . ." Whether he intended to defraud and, if so, who, are subjective questions to be answered by a jury after a full presentation of all the evidence. The District Court's conclusion, as approved by the court below, that "the question of intent to defraud is not debatable" because "there has never been a suggestion that any source of income existed except new loans" is directly contradicted by Respondent's own evidence as to proceeds from the bankrupt's "law business and other personal sources of income" and dramatizes the absurd utilization of summary judgment in the instant case.

The paramount error, most likely to produce judicial mischief, lies in the approval by the court below of the District Court's consideration of the question of Petitioner's knowledge of the bankrupt's frame of mind. By the express terms of Ohio Revised Code Sec. 1313.57, any proscribed intent on the part of the bankrupt would be of utterly no consequence unless and until it is established that Petitioner "knew of such fraudulent intent on the

part of such debtor." The District Court concluded that "the record fully supports the conclusion that defendant should have had knowledge[5] of Stickler's fraudulent scheme."[6] The "record" consists of five affidavits. Respondent's three affidavits are silent on the question of Petitioner's knowledge. Petitioner's affidavit contained his sworn statement:

> "I did not, nor do I now believe, . . . that Stickler intended to prefer me over any other creditor or intended to hinder, delay or defraud any other creditor."

Petitioner's secretary, by affidavit, confirmed his claim. While neither of the opinions below make even passing reference to Petitioner's supporting papers, it is clear that the District Judge decided that the weight of the evidence preponderated in favor of Respondent. The court framed three issues on the question of Petitioner's knowledge and stated that ". . . evidence is found which would support an affirmative answer to either of the first two." (App. 33a) and "It is further concluded that the third issue should also be resolved affirmatively to the plaintiff." (App. 35a) But the trial court is not authorized to weigh evidence or resolve disputed evidential facts on a motion for summary judgment. This Court, in an opinion by Mr. Justice Black affirming the grant of summary judgment, stated:

> "The court below in making findings and entering judgment carefully abstained from the consideration of any evidence which might possibly be in dispute.

---

[5] The substantive law of Ohio requires actual knowledge as demonstrated *infra*.

[6] Knowledge of the fraudulent "scheme" is of no significance. The interdiction of the statutes apply only to transfers where the transferee knew of a fraudulent intent to prefer or defraud creditors.

> We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them."
>
> *Associated Press* v. *United States*, 326 U.S. 1, 6 (1945)

More recently Mr. Chief Justice Warren, in an opinion reversing summary judgment, wrote:

> "Other allegations which in some circumstances might have a bearing on the subject were controverted and therefore can only be resolved by a trial on the merits."
>
> *Free* v. *Bland*, 369 U.S. 663, 671 (1962)

While Respondent's supporting papers were not remotely addressed to the two core questions before the District Court, Petitioner's papers vigorously denied not only his knowledge of the bankrupt's fraudulent intent, but the very existence of the proscribed intent. It would appear that the District Court failed to profit from its previous experience in having its improvident grant of summary judgment reversed by this Court. On that occasion (*United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962)), this Court said:

> "The latter finding represents at least in part the resolution of a head on factual controversy as revealed by the materials before the District Court. . . . In any event both findings represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion."

There was no occasion here for the District Court to concern itself with subtle nuances or underlying facts. To the

extent that there may be said to have been a "head on factual controversy," it did not involve the necessity of repelling, or controverting, anything offered by Respondent. Petitioner's affidavits, in fact, were in no way questioned nor controverted!

As demonstrated, the decision below represents a fundamental and irreconcilable conflict with the applicable decisions of this Court on the same subject.

> ". . . Rule 56 authorizes summary judgment only when the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial . . . ."
>
> *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620, 627 (1944)

Such decision, which we earlier characterized as an "illegitimate child", is in reality a "bastard" among the well-reasoned opinions with which the official reports abound. For brief example:

> "All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment."
>
> *Sarnoff* v. *Ciaglia*, 165 F.2d. 167, (C.A. 3, 1947); *Weisser* v. *Mursam Shoe Corporation*, 127 F.2d. 344 (C.A. 2, 1942); 6 *Moores Federal Practice* 2nd Ed. Sec. 56.11, p. 2070.

> "On motion for summary judgment it is no part of the court's function to try issues of fact, but solely to determine whether there is an issue of fact to be tried."
>
> *Empire Electronics Co.* v. *United States*, 311 F.2d. 175 (C.A. 2, 1962); *Bohn Aluminum & Brass Corp.* v. *Storm King Corp.*, 303 F.2d. 425 (C.A. 6, 1962); *Stanley* v. *Alcock*, 310 F.2d. 17 (C.A. 5, 1962); *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F.2d.

1016, (C.A. 3, 1942); 6 *Moores Federal Practice* 2d. Ed. Sec. 56.15, p. 2101; 3 *Barron & Holtzoff Federal Practice and Procedure*, Sec. 1231, p. 101.

While we recognize that the denial of certiorari has no official precedential effect, it is submitted that the failure to specifically reject the opinion below — particularly since it merely consists of a verbatim recitation of the opinion of the District Court — would cause incalculable damage and confusion in the summary judgment field. The instant case, for instance, is only the first to be resolved by the District Court in a long series of cases filed by Respondent against numerous defendants based on the same factual situation. This Court should not countenance the injustice which would be visited upon numerous individuals upon its failure to reverse a decision which stands alone in opposition to the clear pronouncements of this Court.

(ii)

The judgment of the District Court was based upon its evidential determination that Petitioner "should have had knowledge" (App. 34a) of the bankrupt's "fraudulent scheme." The Ohio statute (R.C. Sec. 1313.57) explicitly validates fraudulent transfers except those where the transferee "knew of such fraudulent intent on the part of such debtor. . . ." The Ohio Supreme Court has accepted the literal wording of the statute and has determined that "actual" knowledge by the transferee is required in order to vitiate a fraudulent transfer. *Lytle* v. *Baldinger*, 84 O.S. 1 (1911); *Carruthers* v. *Kennedy*, 121 O.S. 8 (1929). The cases cited by counsel for Respondent in the lower court on this point involve either actual knowl-

edge or such facts as in law charged the transferee with actual knowledge. The determination by the District Court as to the substantive law of Ohio, as approved by the court below, is in direct conflict with the applicable decisions of the highest court of Ohio.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 16489

THOMAS A. CONROY, Trustee in Bankruptcy for
LESLIE D. STICKLER, Bankrupt,
Plaintiff-Appellee,

vs.

EDGAR I. SHOTT, JR.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

(Filed July 8, 1966)

Decided July 8, 1966

Before: WEICK, Chief Judge and PHILLIPS and EDWARDS, Circuit Judges.

PHILLIPS, Circuit Judge. This is an appeal from the judgment of the district court which granted the motion of plaintiff-appellee for summary judgment, overruled the motion of defendant-appellant for summary judgment, and entered judgment against defendant-appellant for $1,363,410.00 with interest and costs.

Plaintiff-appellee, Thomas A. Conroy, is the trustee in bankruptcy for Leslie D. Stickler, referred to herein as "bankrupt." The bankrupt inaugurated a scheme wherein he would borrow a sum of money from A, then borrow

from B to repay A, borrow from C to repay B and so on. The inducement was a high rate of interest on a short term. This is referred to as a "Ponzi" type scheme. See *Cunningham, Trustee of Ponzi* v. *Brown*, 265 U.S. 1.

Defendant-appellant, Edgar I. Shott, Jr., referred to herein as "defendant," was a lender to the bankrupt. Both bankrupt and defendant were attorneys and had been friends since childhood. Millions of dollars were involved in the scheme and it appears that some 120 or more people made loans to the bankrupt in widely varying amounts, aggregating $3,309,462.05.

The trustee sued the defendant to recover a cumulative total of $1,343,410.00, representing some 600 transactions between the defendant and the bankrupt. The action was filed on March 20, 1963, more than two years after the January 18, 1961, adjudication of bankruptcy. The action is maintained under authority of 11 U.S.C. § 110 (e) (1), (Section 70 (e) (1) of the Federal Bankruptcy Act.)[1]

The memorandum opinon and order of the district judge states that the defendant received $342,900 more from the bankrupt than he loaned. The district judge concluded if the "repayments" to defendant were void or voidable under Ohio statutes, it must be under the provisions of Sections 1335.02, 1313.56 and 1313.57 of the Ohio Revised Code.

Section 1335.02 provided:[2]

---

[1] 11 U.S.C. § 110(e)(1): "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title shall be null and void as against the trustee of such debtor."

[2] This section was repealed October 23, 1961. It and other statutes are cited herein in the form in which they existed at the times material hereto.

"Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods, or chattels, . . . made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to deceive the persons purchasing such lands, tenements, hereditaments; rents, goods, or chattels, is void."

The second of these statutes (O.R.C. § 1313.56) provides for voidability where there has been an intent to establish preference among or to defraud creditors. The third (O.R.C. § 1313.57) limits the application of the preceding section to situations where the transferee "knew of [the] fraudulent intent of the debtor."

Defendant contends that § 1335.02 does not apply because it is directed only toward gifts; and that Sections 1313.56 and 1313.57 would not apply in the absence of knowledge on the part of the defendant of the fraudulent intent of the bankrupt and that such knowledge is not established in the present case.

On this question, the district judge said:

"In determining the applicability of the Ohio statutes, it becomes necessary to make an examination of several questions evolving about the knowledge and intention of the defendant in engaging in the subject transactions, and a parallel inquiry into Stickler's intentions is also pertinent. These questions may fairly be set forth as three statements of issues:

"(1) Did defendant have actual knowledge of Stickler's intent?

"(2) If defendant did not have such actual knowledge, should he have had knowledge of Stickler's intent?

"(3) Is either actual or constructive knowledge on the part of defendant of Stickler's intent a prerequisite to recovery?

"It will be immediately noted that an intent to defraud on the part of Stickler must first be presumed to have existed, but a quick review of the facts clearly established that no doubt as to such intent can exist. Stickler's scheme was the essence of simplicity, not to say of stupidity. At its inception he borrowed from A, then borrowed from B to repay A. The inducement to B was a high rate of interest on a short term, whereupon it became necessary to borrow from C to repay B. This operation continued, with ever increasing rates of interest and shortening of the loan periods until hundreds of transactions involving millions of dollars had been entered into by Stickler. However, since he was insolvent from the moment of the making of the first loan, and since there has never been a suggestion that any source of income existed except new loans (if such may be considered 'a source of income'), the question of intent to defraud is not debatable.

"In making this determination, we are not unmindful of defendant's argument that from the facts 'the opposite conclusion would seem indicated.' Pursuing this argument, defendant states, 'Apparently, Stickler got into financial difficulty and, like the check-kiting scheme employed by many, borrowed against the income he expected from his law practice.' It would not seem to overstretch the doctrine of judicial notice to observe that a lawyer may not reasonably expect to repay loans extending into the millions 'from his law practice,' and the further argument based on the fact that Stickler made no attempt to flee when the scheme collapsed is similarly unimpressive. Parker v. Clary, 106 Ohio App. 295 (1958) and Damarin & Co. v. Huron Iron Co., et al., 47 Ohio St. 581. (1890), cited by defendant, are distinguishable on their facts.

"Passing then, to a consideration of the three issues above enumerated, evidence is found which would support an affirmative answer to either of the first two.

For obvious reasons, however, evidence of actual knowledge of Stickler's fraudulent scheme on the part of the defendant is not overwhelming. This cannot be said of the evidence as to what he should have known. Defendant's loans to Stickler began in 1956 and extended into 1961. Over 600 transactions were entered into between the two, involving, as stated earlier, loans by defendant to Stickler in excess of $1,000,000, with exorbitant 'profits' to the lender. In some instances Stickler repaid loans by the simple expedient of endorsing to defendant the checks of other lenders, from which defendant clearly knew or should have known of the advances of at least the makers of such checks.

"While a minimum of reliance has been placed on this test, in considering Shott's actual or constructive knowledge it is proper to take into account his business and professional background as it appears in the record. A thumbnail view of that background is indicated by the fact that checks in the transactions involved variously came from or went into bank accounts maintained by the defendant in the names of 'Edgar I. Shott, Jr.,' 'Edgar I. Shott, Jr., Attorney,' and 'Shott Investment Company.' It thus clearly appears that defendant was no ordinary layman, ignorant of professional and financial affairs, and the proper test becomes what a reasonably prudent attorney with a special knowledge of investment matters knew or should have known concerning the financial structure and operation of an individual to whom in hundreds of transactions he advanced sums in excess of $1,000,000.

"Even viewed under this test, in spite of our conviction that defendant actually knew of Stickler's intent, it is possible that plaintiff has not known there is no genuine issue of any material fact on that issue within the meaning of Rule 56, (c), Federal Rules of Civil Procedure. Such deficiency in the evidence does not

exist as to constructive knowledge, however, and the record fully supports the conclusion that defendant should have had knowledge of Stickler's fraudulent scheme.

* * * *

"It is further concluded that the third issue should also be resolved affirmatively to the plaintiff. However, in view of the determination made with respect to the issue of constructive knowledge it becomes unnecessary to treat further with the third question, or to consider the unjust enrichment theory debated by counsel."

Defendant further relies upon *National Bank of Commerce* v. *Gettinger*, 68 Ohio St. 389, 67 N.E. 739.

We agree with the following distinction of this case made by the district court:

"Defendant argues that even if Stickler intended to defraud other creditors in making payments to defendant, plaintiff is precluded from recovery under the construction given O.R.C. § 1313.56 (then G.C. § 6343) by the Supreme Court of Ohio in the venerable case of National Bank of Commerce v. Gettinger, 68 Ohio St. 389 (1903). While the syllabus would seem to give some support to defendant's position, the opinion underscores a difference in factual pattern in the following language:

'In the case at bar there is no averment in the amended petition that the defendants below acted in bad faith, or had notice of the insolvency of [the debtor], or received more money from him than he owed them, or that they knew that he had made the said payments in contemplation of insolvency, or to create a preference, or to hinder, delay or defraud his creditors . . . [T]here is no affirmant that the persons receiving said payments knew of his said intent and purposes, and, there-

fore, said petition by its silence, concedes that they acted in good faith, and without notice, in receiving said payments.'

Having concluded that at the very least defendant should have known Stickler's fraudulent intent, the lack of application of Gettinger is readily apparent. Further reading of the opinion demonstrates that the Ohio Supreme Court intended that one receiving preferential payment was to be given protection only if he acted 'in good faith,' on the basis of 'for fair value' and received 'payment of honest claims,' none of which elements is here present."

See also *National Finance Co.* v. *Marlow, Trustee,* 343 F.2d 125 (C.A. 6).

Upon the basis of the above quoted language from the opinion of the district court, we conclude that defendant is charged with constructive knowledge of the fraudulent intent of the bankrupt under facts which are not disputed and that the district court was correct in granting plaintiff's motion for summary judgment on the legal issue of liability.

Under the present state of the record, however, we hold that the district court was in error in entering summary judgment for $1,363,410.00.

The pre-trial order contains the following language:

"Counsel agree on the desirability of a determination on the *issue of liability* prior to submission of evidence on the issue of damages. Plaintiff will file a motion for summary judgment on the liability issue supported by stipulations to the extent possible and supplemented if necessary by affidavit(s). If felt necessary to fully present the liability issue, defendant will thereafter file a cross-motion for summary judgment." (Emphasis supplied.)

Plaintiff's motion for summary judgment was limited to "the question of liability" and did not seek a judgment for a specific amount of damages.

The pleadings, affidavits and other documents on file fail to establish that there is "no genuine issue as to any material fact" with respect to the amount of the judgment to which the trustee is entitled against defendant. Rule 56(c), Federal Rules of Civil Procedure.

The record discloses 600 or more transactions between defendant and the bankrupt, which presumably involved many loans, credits and repayments. The record does not demonstrate to our satisfaction that the cumulative total of $1,393,410 is the correct basis for judgment.

The judgment of the district court is vacated and the case is remanded for a redetermination of the amount of the judgment.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 16489

THOMAS A. CONROY, Trustee in Bankruptcy for LESLIE D. STICKLER, Bankrupt,
Plaintiff-Appellee,

vs.

EDGAR I. SHOTT, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Ohio

---

JUDGMENT

(Filed July 8, 1966)

Before: WEICK, Chief Judge, PHILLIPS and EDWARDS, Circuit Judges.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case remanded for a redetermination of the amount of the judgment.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/S/ CARL W. REUSS, Clerk.

Issued as Mandate:

In the

UNITED STATES DISTRICT COURT

For the Southern District of Ohio, Western Division

Civil Action No. 5287

THOMAS A. CONROY, Trustee in Bankruptcy for Leslie D. Stickler, Bankrupt,

Plaintiff,

vs.

EDGAR I. SHOTT, JR.,

Defendant.

MEMORANDUM OPINION AND ORDER

(Filed January 26, 1965)

In this action the plaintiff Trustee in Bankruptcy seeks to recover from defendant the sum of $1,363,410. This amount ostensibly represented repayment (or partial repayment) of loans, with accrued interest, made by the defendant to Bankrupt. Recovery is sought on the grounds either that to permit defendant to retain this sum would unjustly enrich him at the expense of the creditors of the bankrupt estate, or that the payments were void under Ohio law as to other creditors because made in defraud of their rights.

Various aspects of this cause have heretofore been presented, and the present subjects of consideration are the parties cross motions for summary judgment. In support of those motions, extensive memoranda supported by affi-

davits have been filed and arguments have been presented both formally and in pretrial conference. To the extent that they are hereinafter indicated, the facts appear as they have been established by the pleadings, memoranda, affidavits and oral statements of counsel, and are not in controversy.

Prior to the adjudication, defendant had made loans to Bankrupt in the total amount of $1,020,510, and "repayment"[1] to defendant had been made in the sum prayed for in the complaint. It is thus shown that defendant received $342,900 more from Bankrupt than he had loaned. Some 120 others had made loans to Bankrupt in widely varying amounts, the total of such loans having been $3,309,462.05. Some of these, like defendant, received back in repayments a sum in excess of that advanced, while others received back lesser sums or, in some instances, nothing at all. Bankrupt's receipts from these lenders exceeded by $657,370.78 the total of all repayments made by him.[2]

If the repayments to defendant were void or are voidable under Ohio statutes, it must be under the provisions of Ohio Revised Code, Sections 1335.02, 1313.56 and 1313.57. The first of these provided:[3]

> "Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods, or chattels, * * * made

---

[1] The words "payment," "transfer," or perhaps "assignment" could as accurately (or as inaccurately) be used here, and where "repayment" hereinafter appears it is used in a generic rather than in a precise sense.

[2] These figures appear in an exhibit to the Supplemental Affidavit of John E. Shriver, Certified Public Accountant, who made a reconstruction of Bankrupt's accounts. While some slight discrepancy in dollar amounts may exist between this and other records, any such inaccuracy would in no way affect the conclusion here reached.

[3] This section was repealed October 23 ,1961. It and other statutes are herein cited in the form in which they existed at the times material hereto.

> or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the persons purchasing such lands, tenements, hereditaments, rents, goods, or chattels, is void."

The second of these statutes (O.R.C. § 1313.56) provides for voidability where there has been an intent to establish preference among or to defraud creditors. The third (O.R.C. § 1313.57) limits the application of the preceding section to situations where the transferee "knew of [the] fraudulent intent of the debtor."

In determining the applicability of the Ohio statutes, it becomes necessary to make an examination of several questions evolving about the knowledge and intention of the defendant in engaging in the subject transactions, and a parallel inquiry into Stickler's intentions is also pertinent. These questions may fairly be set forth as three statements of issues:

(1) Did defendant have actual knowledge of Stickler's intent?

(2) If defendant did not have such actual knowledge, should he have had knowledge of Stickler's intent?

(3) Is either actual or constructive knowledge on the part of defendant of Stickler's intent a prerequisite to recovery?

It will be immediately noted that an intent to defraud on the part of Stickler must first be presumed to have existed, but a quick review of the facts clearly establish that no doubt as to such intent can exist. Stickler's scheme was the essence of simplicity, not to say of stupidity. At its inception he borrowed from A, then borrowed from B to repay A. The inducement to B was a high rate of interest on a short term, whereupon it became necessary to borrow from C to repay B. This operation continued, with ever

increasing rates of interest and shortening of the loan periods until hundreds of transactions involving millions of dollars had been entered into by Stickler. However, since he was insolvent from the moment of the making of the first loan,[4] and since there has never been a suggestion that any source of income existed except new loans (if such may be considered "a source of income"), the question of intent to defraud is not debatable.

In making this determination, we are not unmindful of defendant's argument that from the facts "the opposite conclusion would seem indicated." Pursuing this argument, defendant states, "Apparently, Stickler got into financial difficulty and, like the check-kiting scheme employed by many, borrowed against the income he expected from his law practice." It would not seem to overstretch the doctrine of judicial notice to observe that a lawyer may not reasonably expect to repay loans extending into the millions "from his law practice," and the further argument based on the fact that Stickler made no attempt to flee when the scheme collapsed is similarly unimpressive. *Parker* v. *Clary*, 106 Ohio App. 295 (1958) and *Damarin & Co.* v. *Huron Iron Co., et al.*, 47 Ohio St. 581 (1890) cited by defendant, are distinguishable on their facts.

Passing, then, to a consideration of the three issues above enumerated, evidence is found which would support an affirmative answer to either of the first two. For obvious reasons, however, evidence of actual knowledge of Stickler's fraudulent scheme on the part of the defendant is not overwhelming. This cannot be said of the evidence as to what he should have known. Defendant's loans to Stickler began in 1956 and extended into 1961. Over 600

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[4] There is indication dehors the record that insolvency preceded that date.

transactions were entered into between the two, involving, as stated earlier, loans by defendant to Stickler in excess of $1,000,000, with exorbitant "profits" to the lender. In some instances Stickler repaid loans by the simple expedient of endorsing to defendant the checks of other lenders, from which defendant clearly knew or should have known of the advances of at least the makers of such checks.

While a minimum of reliance has been placed on this test, in considering Shott's actual or constructive knowledge it is proper to take into account his business and professional background as it appears in the record. A thumbnail view of that background is indicated by the fact that checks in the transactions involved variously came from or went into bank accounts maintained by the defendant in the names of "Edgar I. Shott, Jr.", "Edgar I. Shott, Jr., Attorney", and "Shott Investment Company". It thus clearly appears that defendant was no ordinary layman, ignorant of professional and financial affairs, and the proper test becomes what a reasonably prudent attorney with a special knowledge of investment matters knew or should have known concerning the financial structure and operation of an individual to whom in hundreds of transactions he advanced sums in excess of $1,000,000.

Even viewed under this test, in spite of our conviction that defendant actually knew of Stickler's intent, it is possible that plaintiff has not shown there is no genuine issue of any material fact on that issue within the meaning of Rule 56, (c), Federal Rules of Civil Procedure. Such deficiency in the evidence does not exist as to constructive knowledge, however, and the record fully supports the conclusion that defendant should have had knowledge of Stickler's fraudulent scheme.

Defendant argues that even if Stickler intended to defraud other creditors in making payments to defendant, plaintiff is precluded from recovery under the construction given O.R.C. § 1313.56 (then G.C. § 6343) by the Supreme Court of Ohio in the venerable case of *National Bank of Commerce* v. *Gettinger,* 68 Ohio St. 389 (1903). While the syllabus would seem to give some support to defendant's position, the opinion underscores a difference in factual pattern in the following language:

> "In the case at bar there is no averment in the amended petition that the defendants below acted in bad faith, or had notice of the insolvency of [the debtor], or received more money from him than he owed them, or that they knew that he had made the said payments in contemplation of insolvency, or to create a preference, or to hinder, delay or defraud his creditors * * * [T]here is no affirmant that the persons receiving said payments knew of his said intent and purposes, and, therefore, said petition by its silence, concedes that they acted in good faith, and without notice, in receiving said payments."

Having concluded that at the very least defendant should have known of Stickler's fraudulent intent, the lack of application of *Gettinger* is readily apparent. Further reading of the opinion demonstrates that the Ohio Supreme Court intended that one receiving preferential payment was to be given protection only if he acted "in good faith," on the basis of "for fair value" and received "payment of honest claims," none of which elements is here present.

It is further concluded that the third issue should also be resolved affirmatively to the plaintiff. However in view of the determination made with respect to the issue of constructive knowledge it becomes unnecessary to treat

further with the third question, or to consider the unjust enrichment theory debated by counsel.

Since some reference has been made to other lenders of money to Stickler, whose relationships to the plaintiff would vary from this defendant's only to the extent that their loans have been repaid, mention should be made of the fact that Stickler had other creditors whose claims arose out of completely different classes of obligations, as for example the purchase by Stickler of items of personal property. In prosecuting this action, as in pursuing other assets of the Bankrupt including claims against other creditors in defendant's category, the plaintiff Trustee is carrying out his assigned responsibility of creating a fund in which properly proven claimants may participate.

In accordance with the foregoing,

IT IS ORDERED that the motion of the defendant for summary judgment should be and it is hereby overruled, and that the motion of the plaintiff for summary judgment should be and it is hereby sustained; and that a Judgment Entry in conformity herewith be presented.

JOHN W. PECK
District Judge.

Federal Rules of Civil Procedure

Rule 56. Summary Judgment.

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be

made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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No. 546

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

EDGAR I. SHOTT, JR.,
Petitioner,

vs.

THOMAS A. CONROY, Trustee in Bankruptcy for Leslie D. Stickler, Bankrupt,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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Texts Cited:

Section 1335.02, Ohio Revised Code 4, 7
Section 1313.56, Ohio Revised Code 4
Section 1313.57, Ohio Revised Code 4

In The

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October Term, 1966

No. 546

EDGAR I. SHOTT, JR.,
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THOMAS A. CONROY, Trustee in Bankruptcy for Leslie D. Stickler, Bankrupt,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the granting of Summary Judgment to the Respondent was proper where (1) there was no contested issue of material fact, and (2) the court properly applied the substantive law of the State of Ohio.

THE STATUTES INVOLVED

Contrary to the Petitioner's assertion that the Court of Appeals did not rely on Section 1335.02, Ohio Revised Code, entitled "Gifts and Grants to Defraud Creditors Void," the Court of Appeals not only based its decision on such statute, but quoted it in its Opinion (Petitioner's Brief, page 21), and merely paraphrased Section 1313.56

and 1313.57, Ohio Revised Code. Note Section 1335.02, as set out in the Court of Appeals' Opinion:

> "Every gift, grant, or conveyance of land, tenaments, hereditaments, rents, goods, or chattels, * * * made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to deceive the persons purchasing such lands, tenaments, hereditaments, rents, goods, or chattels, is void."

STATEMENT OF THE CASE

Respondent is the Trustee in Bankruptcy for Leslie D. Stickler, who is seeking to recover from Petitioner, payments made by the Bankrupt to the Petitioner and many others in a "Ponzi" type scheme operated by the Bankrupt, wherein the Petitioner received exorbitant interest or fictitious profits on loans made by him to the Bankrupt. These loans extended over a number of years, involving in excess of six hundred transactions, with interest running from 120% to 360% per annum. As the scheme snowballed, the interest rates or fictitious profits demanded by Petitioner grew as he shortened the period of the "loans." In the last few weeks before the collapse, the Petitioner stopped lending altogether, and took down from the Bankrupt, some $90,000.00 in cash.

The theory of the Respondent's cause of action is that the transfers made by the Bankrupt to the Petitioner were fraudulent conveyances under applicable state law, which the Respondent as Trustee in Bankruptcy, can have set aside and repaid to it. The Petitioner thereupon would have a right, under the applicable provisions of the Bankruptcy Act, to participate on a pro rata basis with others who were part of the fraudulent scheme, on the basis of the amount of their payments to the Bankrupt. The Bankrupt had other creditors of the "butcher, baker and candle-

stick maker" type, who were not participants in the scheme, but who extended credit and lost heavily by reason of the Bankrupt's apparent wealth, generated by the scheme.

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

(1) There was no contested issue of material fact.

At the Pretrial conference in the District Court, counsel for the Petitioner conceded that no issues of fact were involved:

> "The Court: * * * I take it particularly from the defendant's pretrial statement that there really aren't any issues of fact that are going to present any problem. Is that true?
>
> "Mr. Andrews (attorney for defendant): I don't think there are going to be any issues of fact. There are a lot of things that—
>
> "Mr. John A. Lloyd, Jr., Esq., attorney for defendant, enters the chambers.
>
> "The Court: I had just said before you came in, Mr. Lloyd, that I take it from the pretrial statement that there really are no factual issues here or they don't amount to much. To put it another way, if there are any I think they could be resolved right here, but I frankly don't know what they are.
>
> "Mr. Lloyd: I agree." (App. 12b-13b)

> "The Court: There is no argument on the facts on this point though, that you can establish these facts by stipulation or whatever and then make your respective arguments on the points you are talking about now. Whether or not there is a presumption of fraudulent intent will simply be a matter for the determination of the court. There is no problem created there.
>
> "Mr. Andrews: (Nodding.)" (App. 32b)

Thereupon, as the Court of Appeals noted, the Pretrial Order of the District Court provided:

> "Counsel agree on the desirability of a determination on the issue of liability prior to submission of evidence on the issue of damages. Plaintiff will file a Motion for Summary Judgment on the liability issue, supported by stipulations to the extent possible and supplemented, if necessary, by affidavit(s). If felt necessary to fully present the liability issue, defendant will thereafter file a Cross-Motion for Summary Judgment."

The foregoing was the basis for the filing of the Cross-Motions for Summary Judgment in this action; and as far as Respondent is concerned, there are at least two statutory grounds upon which Summary Judgment should be granted to the Respondent: Section 1335.02, O.R.C., covering fraudulent conveyances, and Section 1313.56 and 1313.57, O.R.C., referring to preferential transfers as well as fraudulent transfers.

These statutes require that the fraudulent intent of the transferor be established. However, Section 1335.02, O.R.C. does not require proof of knowledge on the part of the transferee of the fraudulent intent of the transferor, whereas Section 1313.57 does require knowledge by the transferee.

Thus, the questions before the District Court on the Cross-Motions for Summary Judgment was the determination whether the transferor, the Bankrupt Stickler, intended to defraud his creditors, and if so, then, *first*, whether the Petitioner had actual knowledge of the transferor's intent, *secondly*, if not, whether the Petitioner should have had such knowledge, or, *thirdly*, whether the establishment of actual or constructive knowledge of Petitioner of Stickler's intent is a "prerequisite to recovery."

The basic question involving the fraudulent intent of Stickler and the Petitioner's knowledge thereof is whether the Affidavits of Respondent and Petitioner present a "genuine issue of material fact" under Rule 56 (c) of the Federal Rules of Civil Procedure. This issue must be one of evidentiary fact, not merely as to the legal conclusion to be drawn from the evidentiary facts. *Fox* v. *Johnson & Wimsatt, Inc.,* 127 F.2nd 729, 736-7 (D.C. Cir. 1942). Judge Rutledge, in affirming a Summary Judgment, stated:

> "There was a conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them respecting intention. But there was none as to the facts themselves. In other words, the evidentiary facts were not substantially in dispute * * *. Conflict concerning the ultimate and decisive conclusion to be drawn from the undisputed facts does not prevent rendition of a summary judgment when that conclusion is one to be drawn by the court. The court had before it, all the facts which a formal trial would have produced. Going through the motions of a trial would have been futile."

See also *Dickheiser* v. *Penn. R.R. Co.,* 5 FRD 5 (D.C. Pa. 1945), affirmed 155 F.2nd 266 (3rd Cir. 1946), cert. den. 329 U.S. 808 (1947); *Heart of America Lumber Co.* v. *Belove,* 28 F. Supp. 619 (W.D. Mo. 1939), affirmed 111 F.2nd 535 (8th Cir. 1940). (On Summary Judgment court determined ultimate fact as to whether building was damaged or destroyed by fire.)

None of the statements of evidentiary fact in Respondent's Affidavits was denied by Petitioner. They must, therefore, under Rule 56 (c), be taken to be true, for the purposes of Summary Judgment.

As the District Judge observed in his Memorandum Opinion, (Petitioner's Brief, Page 29), which was also

adopted by the Court of Appeals (Petitioner's Brief, page 22), the fraudulent intent of Stickler "is not debatable." By the very nature of his "Ponzi" type scheme, every payment involving unconscionable interest or fictitious profits, resulted necessarily in the defrauding of his creditors. In addition, the record made clear that Stickler made false representations that he was "lending such sums to contractors who could afford to pay a substantial return for the short term use of such funds." (App. 27a). No such contractors, of course, existed and no such loans were made. (App. 21a). Petitioner attempted to compare Stickler's operations to the standard check kiting methods sometimes used to cover a temporary shortage of funds, and suggested that Stickler expected to repay the loans out of his income from his law practice. The District Judge clearly disposed of this contention with the comment:

> "It would not seem to overstretch the doctrine of judicial notice to observe that a lawyer may not reasonably expect to repay loans extending into the millions 'from his law practice.'" (Petitioner's Brief, page 32.)

What the Bankrupt said and did is proof of his fraudulent intent, for, as pointed out by Mr. Justice Vinson in *American Communications Association* v. *Douds,* 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925, at page 411: "* * * while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does." See also *Radio Officers Union* v. *NLRB,* 347 U.S. 17, 74 S. Ct. 324, 98 L. Ed. 455, at page 45: "* * * the common law rule that a man is held to intend the foreseeable consequences of his conduct. (Citations and other cases in the Supreme Court of the United States omitted.)"

(2) The Court properly applied the substantive law of the State of Ohio.

Respondent submits that under Ohio law, establishment of Petitioner's knowledge of Stickler's fraudulent intent is not necessary to void the transfers at issue. The courts of Ohio have repeatedly held that under Section 1335.02, O.R.C., the knowledge of the transferee of the transferor's fraudulent intent is not material. *Conrad* v. *Sample,* 107 O.A. 66, 156 N.E.2nd 748, 749-50 (1958):

> "In Section 1335.02, Revised Code, there is no requirement that an action brought under favor of that section shall contain an allegation that the transferee of the property, where the transfer is alleged to have been made to defraud creditors, knew of the fraudulent intent of the debtor transferor."

See also, *Burket* v. *Claypool,* 35 O.L.A. 126, 39 N.E.2nd 873; *Ortman* v. *Falknor,* 27 O.L.A. 312 (App. 1938); *Ursak* v. *Sivanick,* 56 O.A. 434, 10 N.E.2nd 1017 (1937).

The District Court, as well as the Court of Appeals, recognized that it was unnecessary to establish either actual or constructive knowledge on the part of the Petitioner, of Stickler's intent as a prerequisite to recovery, when the Court stated: "It is further concluded that the third issue should also be resolved affirmatively to the plaintiff." (Opinion of District Court, Petitioner's Brief, page 34, Opinion of the Court of Appeals, Petitioner's Brief, page 24.)

However, assuming that, *arguendo,* actual or constructive knowledge of Stickler's intent by the Petitioner must be established, it is hard to ignore the statement of Petitioner's counsel at the Pretrial Conference in the District Court:

> "The Court: Mr. Andrews, what would your evidence show that Shott thought Stickler was doing with this?

> "Mr. Andrews: Judge, I attended a meeting at my office one time. I never believed this scheme, and I had conversations with Shott for years about it, telling him to get out of it." (App. 26b).

Moreover, the number and size of the transactions between the Petitioner and Stickler is significant. Petitioner participated in approximately six hundred transactions with Stickler over a period of more than four years, involving over a million dollars. His "investment" was more than twice as large as any of Stickler's other lenders. He also made "loans" on behalf of others. Certainly a reasonably prudent attorney must be charged with knowledge of a scheme in which he was so heavily involved.

Furthermore, such knowledge is clearly indicated by the series of transfers to Shott during the last few weeks before Stickler's scheme collapsed. From December 16, 1960 through January 4, 1961, Shott received almost $90,000.00 from Stickler. The collapse occurred on January 7th, 1961. During the period from December 14th to January 7th, Shott made no more loans to Stickler. An examination of the Shott-Stickler transactions shows such a consecutive series of payments to be unique. Obviously, the Petitioner knew the essential nature of Stickler's scheme and that the pressure of creditors was endangering the operation.

In addition to the foregoing, an analysis of the six hundred transactions between Stickler and the Petitioner, according to the Affidavit of the Certified Public Accountant who reconstructed Stickler's operation, points out the grossly inadequate consideration that Stickler was forced to pay Petitioner for the use of his money:

> "According to Mr. Stickler's records, the interest varied from 120% per annum to 360% per annum. On a cumulative basis, according to Mr. Stickler's records, Shott loaned Stickler $1,020,510.00, received

> back as principal $969,000.00, and interest $394,410.00, for a total of $1,363,410.00. Stickler's records disclosed that $51,510.00 in principal is still owed Shott. If interest had been calculated at the maximum legal rate of 8% per annum, on a daily basis balance for the total period of Shott's dealings with Stickler from September, 1956, Stickler should have paid $21,212.57 as interest, so that the *excess interest or profits or consideration paid for the use of Shott's funds was $373,197.43.*" (Emphasis added.) (App. 19a).

Only the most naive would have invested more than a million dollars in such a scheme without recognizing its nature, and the Petitioner was not such an investor. Rather, he did recognize the scheme for what it was and the possibilities for profits therein. In any event, as noted by the Court of Appeals, the Petitioner received $342,900.00 more from Stickler than he loaned him.

Although it was not necessary for the courts below to consider whether Shott had knowledge of Sticklers intent, both the District Court and the Court of Appeals found that at the very least Petitioner "is charged with constructive knowledge of the fraudulent intent of the Bankrupt under facts which are not disputed. * * *" (Opinion of the Court of Appeals, Petitioner's Brief, page 25.) Ohio case law establishes that constructive knowledge is sufficient: *Loudenback* v. *Foster,* 39 O.S. 203 (1883); knowledge inferred from circumstances of sale: *Blackford* v. *Gaynor,* 50 O.A. 494, 198 N.E. 736 (1934); the court recognized that knowledge of fraudulent intent could be inferred from inadequacy of consideration: *Burbridge* v. *Seely, Morely* & *Co.,* Wright 359 (1833); knowledge inferred from retention of possession: *Lyons, Trustee* v. *Riker,* 29 O. Law Reports 324, 325 (U.S.D.C., N.D. O., 1929): "Likewise, Riker had knowledge of facts such as must charge him with knowledge of Smith's insolvency, and having

participated in that intent to create a preference;" *In re Lee,* 129 F. Supp. 920 (N.D. O., 1955). Note *Veazie* v. *Williams,* 8 Howard 134, 12 L. Ed. 1018, to the effect that inadequacy of price may be so gross as to raise the presumption of fraud.

Therefore, the Courts below properly applied the substantive law of Ohio to the undisputed facts disclosed by the pleadings, affidavits and other material before the Courts below.

REASONS FOR DENYING THE WRIT

It is submitted that the decision of the Court of Appeals is not in conflict with that of any other Court of Appeals or with this Honorable Court, nor was the decision of the Court below in conflict with the substantive law of Ohio.

Simply stated, the District Court determined that there were no genuine issues of evidentiary fact to be determined in this case. Counsel for both parties agreed with the Court that it was for the Court to determine the legal inferences to be drawn from the undisputed facts, and this is precisely what the District Court did, after all parties agreed that the proper method for presenting the matter of liability to the Court was on Cross-Motions for Summary Judgment.

Under the substantive law of Ohio, once it was established that the Bankrupt Stickler harbored an intent to defraud his creditors while operating his "Ponzi" type scheme, the Court could have stopped at this point and rendered judgment for the Respondent without even examining into Petitioner's knowledge of Stickler's intent.

Parenthetically, it should be pointed out that the reason the Judgment was granted to the Respondent by the District Court for $1,393,410.00, which monetary judgment was vacated by the Court of Appeals because "the

record does not demonstrate to our satisfaction that the cumulative total of $1,393,410.00 is the correct basis for judgment" (Petitioner's Brief, page 26), was because all the evidentiary facts on the issue of damages were before the District Court and there was no contest thereon. The District Court had before it, Stickler's records of his dealings with the Petitioner, as well as the reconstruction of the Bankrupt's financial affairs by the Certified Public Accountant. Since the Petitioner had previously declined to produce his records on the grounds of self-incrimination and did not dispute Respondent's exhibits, it was apparent that no further evidence would be forthcoming at a trial. The District Court, therefore, simply concluded, after deciding the question of liability, that to avoid the vain formality of a trial, the damage question should also be determined in the Summary Judgment.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari in the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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